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Criminal Law--Search, Seizure and Arrest Without Warrant-- Probable Cause Necessary to Justify

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prevail. *Id.* The strength of the *International Shoe* ruling is that it does away with former fictions and makes the only test one of reasonableness according to the peculiarities of each case. Such a test in the light of governmental and economic evolution and judicial progress fulfills our present needs while allowing for growth.

J. Mc K.

CRIMINAL LAW—SEARCH, SEIZURE AND ARREST WITHOUT WARRANT—PROBABLE CAUSE NECESSARY TO JUSTIFY.—*D* illegally imported narcotics into the United States from Mexico and was waiting at a San Diego coffee shop for some of her accomplices to join her. Narcotics agents, acting upon information supplied to them by an informer whom they had not previously known, proceeded to the coffee shop and arrested *D* without a warrant. At the police station, one of the agents required *D* to surrender two rubber contraceptives containing heroin which had been concealed on her person. *D* contended that the agents did not have sufficient probable cause to arrest without a warrant; therefore, the narcotics evidence should have been suppressed because obtained by a search incident to an unlawful arrest. *Held*, affirming conviction, that narcotics agents, when relying solely upon an informant previously unknown to them, must have some reasonable grounds to believe that their informer is reliable, but the corroboration of reliability may take place up to the actual moment of arrest. The verification not only of the informer's identity, by contacting local police authorities, but also of his story, by finding petitioner at the place where he said she would be, was sufficient to establish this reliability. *Rodgers v. United States*, 267 F.2d 79 (9th Cir. 1959).

D drove into a garage attached to a liquor store which had a reputation of being a supplier to dry state liquor haulers and which was at the time under surveillance by alcohol-tax agents. When *D*'s car emerged it appeared to be heavily loaded as it proceeded toward the dry state line. An examination of the car, after it was stopped by a roadblock, revealed that the overload springs were markedly compressed, although there was nothing visible through the automobile windows that could account for such compression. Upon opening the trunk the agents found twenty-six cases of liquor. *D* insisted that the evidence obtained should be suppressed as incident to an unlawful search and seizure, in that probable cause did not exist to justify such action without a warrant. *Held*, affirming con-

viction, that where there was a warranting basis for stopping a vehicle, such information as the agents acquired thereafter, from proper acts of conversation or observation, was legally entitled to be taken into account in testing the probable cause which could be regarded as existing as to a subsequent search in which the agents engaged. *Smith v. United States*, 264 F.2d 469 (8th Cir. 1959).

Although the principal cases had the common characteristic of apprehension without warrants, in the *Rodgers* case, *supra*, arrest preceded search and seizure, while in the *Smith* case, *supra*, arrest was subsequent to a search and seizure. This ostensible disparity in the order of events is of no legal significance. The "probable cause" for search and seizure under the Fourth Amendment, U.S. CONST. amend. IV, and the "reasonable grounds" necessary for arrest under § 104 (a) of the Narcotics Control Act, INT. REV. CODE OF 1954 § 7607, are substantial equivalents of the same meaning. *Draper v. United States*, 358 U.S. 307 (1959). That there is no appreciable difference in the degrees of probable cause necessary to act with or without a warrant is also attested to by the practice of the courts in testing probable cause for action without a warrant by deciding a posteriori whether a warrant could have been issued on the basis of the information possessed by the arresting agents before they acted. *Hamer v. United States*, 259 F.2d 274 (9th Cir. 1958). Additional support is found in cases involving activity without warrants, *Draper v. United States*, *supra*, where definitions of probable cause have been obtained by referring to cases involving activity with warrants. *Dumbra v. United States*, 268 U.S. 435 (1925); *Steele v. United States*, 267 U.S. 498 (1925).

Having determined that arrest or search and seizure without a warrant must be based upon probable cause, *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Weeks v. United States*, 232 U.S. 383 (1914), a definition of the term becomes relevant. From *Locke v. United States*, 7 Cranch 339 (U.S. 1813) to the present, probable cause has been interpreted to mean reasonable grounds under the circumstances. It exists where the facts and circumstances within the officer's knowledge are sufficient in themselves to warrant a man of reasonable prudence and caution in the belief that an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132 (1925). Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room is allowed for "... some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their

conclusions of probability." *Brinegar v. United States*, 338 U.S. 160 (1949). Although there is some dicta to the contrary in *Grau v. United States*, 287 U.S. 124 (1932), by the great weight of authority probable cause does not require evidence sufficient for conviction. *Draper v. United States*, *supra*. Even from its inception the *Grau* dicta was saliently criticized, 46 HARV. L. REV. 1307, and today, at the most, it serves as mute testimony to the sometime anachronistic tendencies of judicial decisions. "There is a large difference between the two things to be proved (guilt and probable cause), as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them." *Draper v. United States*, *supra* at 312.

There are three general headings under which most of the cases involving search and seizure or arrest without a warrant may be grouped: a. where the officer has sufficient probable cause to act on the basis of his own observation and knowledge; b. where the officer has acted solely on information supplied by an informer; c. where the officer's knowledge is combined with information obtained from an informer. Two of these situations are exemplified by the principal cases, and a discussion thereof will naturally supply the essentials for coverage of the third.

In the *Smith* case the officers relied upon their own knowledge in establishing probable cause for acting without a warrant. In affirming the existence of that element the court examined such facts as their systematic surveillance of an establishment with a reputation for such illegal activity, and their observation of the heavily depressed rear springs of defendant's automobile, which observation would not unreasonably lead one to conclude that liquor was destined for a dry state. *Lawson v. United States*, 254 F.2d 706 (8th Cir. 1958).

Where an officer has acted solely upon information supplied by an informant, the results of such activity must still be based upon probable cause. But probable cause in this instance consists in establishing the reliability of the informer and corroborating the information so given. The reliability may be established at the moment the informer speaks, as where he is well-known to officers, and the genuineness and sufficiency of the current information may be determined up to the moment of legal significance, i.e. up to the moment the defendant's liberty is infringed. *United States v. Gurnes*, 258 F.2d 530 (2d Cir. 1958); *Gilliam v. United States*, 189 F.2d 321 (6th Cir. 1951). Just as evidence insufficient for conviction may be

quite adequate for establishing probable cause, so also may the corroboration of hearsay evidence supplied by an informer, generally inadmissible at trials, be introduced to show probable cause in these cases. *United States v. Li Fat Tong*, 152 F.2d 650 (2d Cir. 1945).

Where an arrest or search and seizure have been prompted by a combination of the officer's own knowledge and information supplied by an informer, elements of the first two categories must likewise join to produce ample probable cause under the circumstances. *Husty v. United States*, 282 U. S. 694 (1931); *United States v. Kancso*, 252 F.2d 220 (2d Cir. 1958). Personal observation by officers will validate an arrest made after an investigation, when the investigation is initiated as a result of a "tip", only if the conclusions drawn from that observation are reasonable and then only if the "tip" has been established as reliable. *Johnson v. United States*, 333 U. S. 10 (1948).

From what has been said to this point it follows a fortiori that there is no probable cause where an officer acts without any knowledge of the commission of a crime except from an informer whose reliability has not been determined. *Cervantes v. United States*, 263 F.2d 800 (9th Cir. 1959). This is so, regardless of how accurate the information proved to be in the subsequent search and seizure. *Contee v. United States*, 215 F.2d 324 (D.C. Cir. 1954); *United States v. Castle*, 138 F.Supp. 436 (D.D.C. 1955). In the *Rodgers* case it is suggested that information obtained under duress or prolonged confinement would be inadmissible as establishing the reliability of an informer, just as it would be inadmissible as a confession of guilt by the defendant. But the criteria for testing duress or prolonged confinement appear to be contained in *Upshaw v. United States*, 335 U. S. 410 (1948) and *McNabb v. United States*, 318 U. S. 332 (1943).

The principal cases merit attention because they highlight the law as to probable cause for arrest or search and seizure without a warrant. The *Rodgers* case brings an additional factor into perspective—the role of the informer. That case follows the effect of *Draper v. United States*, *supra*, in adding prestige to the informer's role by recognizing his word as a basis of probable cause, subject to confirmation by the arresting officer.

Reasonable ground ". . . is the litmus paper for testing validity (of activity) without a warrant." *United States v. Walker*, 246 F.2d

519, 527 (7th Cir. 1957). The dignity and sanctity of the individual are not to be jeopardized by the whim or zeal of policemen. The constitutional insulation of prior judicial determination of probable cause is suspended only under classes of exigencies which have received judicial approval on review and which now form a discernible pattern of instances. In these situations the law is adjusted and imposes on the law enforcement agent a standard of discrimination. Those who fear that the increased latitude given to officers of the law will evolve into pure license may take heart from the fact that most of the cases in this area are cast in a mold of judicial caution, the primary aim of which is the preservation of individual liberty during attempts to meet the imperatives of contemporary law enforcement problems.

E. P. K.

CONTRACTUAL LIABILITY OF GOVERNMENT FOR AN ACT ENHANCING COST OF PERFORMANCE—ELEMENT OF KNOWLEDGE.—*P* contracted with a government agency for certain construction work. Subsequently, *D*, the government, awarded an atomic energy project in the same area. Wages on the atomic project were in excess of those paid by *P* and in order to maintain his labor force, *P* was forced to raise his wage level. *P* contended it was entitled to recover increased costs because of a breach by *D* of an implied condition that neither party would hinder the other in the discharge of any obligations created by contract. *Held*, *D*'s motion for summary judgment denied and case referred to trial commission. If *D* knew at the time it contracted with *P* that it was going to do something which would require *P* to pay a wage that was higher than that existing in the community where the work was to be done and *P* was ignorant of the fact, good faith required *D* to inform *P* thereof. *Bateson-Stolte, Inc. v. United States*, 172 F. Supp. 454 (Ct.Cl. 1959).

It is an implied condition of every contract that neither party will hinder the other in his discharge of obligations imposed upon him, nor increase his cost of performance. *Beuttas v. United States*, 324 U.S. 768 (1945).

"Applicability of this principle in a given case depends not only on the nature of the act which is alleged to have increased the cost of performance but also upon the intention of the parties with respect to such an act, either expressed or implied in the contract." *Sunswick Corp. v. United States*, 109 St.Cl. 772, 75 F.Supp. 221 (1948).